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In the Supreme Court of the United States

OCTOBER TERM, 1978

OWEN G. COOK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Page

Opinion below 1

Jurisdiction 1

Questions presented 1

Statement 2

Argument 3

Conclusion 12

CITATIONS

Cases:

Griego v. *United States*, 298 F. 2d 845 5

Hamling v. *United States*, 418 U.S. 87 10

Johnson v. *United States*, 410 F. 2d 38, cert. denied, 396 U.S. 822 10

Pino v. *United States*, 370 F. 2d 247, cert. denied, 387 U.S. 922 9

United States v. *Abrams*, 427 F. 2d 86, cert. denied, 400 U.S. 832 6

United States v. *Beard*, 414 F. 2d 1014 11

United States v. *Bramblett*, 348 U.S. 503 9

United States v. *Bright*, 517 F. 2d 584 6

United States v. *Catena*, 500 F. 2d 1319, cert. denied, 419 U.S. 1047 11

United States v. *Egenberg*, 441 F. 2d 441 6

United States v. *Esquer-Gamez*, 550 F. 2d 1231 ..... 6, 7

Page

Cases—Continued:

United States v. *Evans*, 559 F. 2d 244 5

United States v. *Grizaffi*, 471 F. 2d 69 5

United States v. *Lange*, 528 F. 2d 1280 5

United States v. *Restrepo-Granda*, 575 F. 2d 524, cert. denied, No. 78-5448 (Oct. 30, 1978) 5

United States v. *Salliey*, 360 F. 2d 699 11

United States v. *Sarantos*, 455 F. 2d 877 6

United States v. *Thomas*, 484 F. 2d 909 5

Statutes:

40 Stat. 1015-1016 9

62 Stat. 698 9

62 Stat. 749 9

18 U.S.C. 2(b) 10, 11

18 U.S.C. 287 ..... 2, 8, 9, 10

18 U.S.C. 1001 ..... 6, 9

18 U.S.C. 2314 11

Miscellaneous:

American Law Institute's Model Penal Code, §2.02(7) (1962) 4, 8

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A.) is reported at 586 F. 2d 572.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1978. A petition for rehearing was denied on February 2, 1979. The petition for a writ of certiorari was filed on March 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury concerning the culpability element of the offenses with which petitioner was charged.

2. Whether the indictment adequately alleged the elements of an offense under the false claims statute, 18 U.S.C. 287.

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on five counts of knowingly presenting a false claim to a government agency, in violation of 18 U.S.C. 287. He was sentenced to consecutive terms of five years' imprisonment on two counts and a total fine of $25,000 on the three remaining counts. The court of appeals affirmed (Pet. App. A).

The evidence showed that on May 1, 1975, petitioner purchased Mikelco, Inc.,. a company located in Bandera, Texas. The company engaged in overhauling and repairing aerospace ground equipment for the United States Air Force under government contract (Tr. 76, 78, 107). Items or parts in need of repair or overhaul were sent to Mikelco from Kelly Air Force Base in San Antonio, Texas. After a perfunctory inspection, Mikelco employees prepared a cost estimate for the necessary repairs. They submitted the estimate to Robert Bean, a former owner of Mikelco who was employed by petitioner as a consultant (Tr. 74, 96, 182, 185-186). Bean in turn inflated the estimates and submitted them to the Air Force for approval. Bean raised many cost estimate to 65% of the item's original acquisition cost, the maximum figure that the Air Force would approve routinely. Mikelco employees would then disassemble the item and determine what parts needed to be replaced. Under its contract with the government, Mikelco was to earn a profit only as a percentage of labor charges; replacement parts unavailable from government stocks were to be purchased from the low-bidding private supplier and sold to the Air Force at cost. Mikelco, however, obtained some of the needed parts from stashes of

stolen government equipment; the company then submitted false invoices to the government for reimbursement (Tr. 139-140, 189-192, 366-378).

The false invoices were prepared by Richard Weber, Mikelco's Material Control Manager. Weber used blank invoices from several companies, including Abtex Sales and Services, a company owned by petitioner. Although Weber submitted many false invoices on Abtex forms, Mikelco never purchased any merchandise from Abtex, (Tr. 372-376, 437, 502-503). Periodically, Weber informed petitioner of the gross weekly receipts that could be expected from the use of the falsified invoices (Tr. 380-381). The indictment in this case covered five such claims supported by false invoices from Abtex for fictitious parts. Monies received from the government on these claims were then deposited in an Abtex checking account (Tr. 547-550).

Abtex was a fictitious company. It was not registered to do business in Texas and there was nothing located at its alleged address (Tr. 547, 624-627). Petitioner opened the Abtex checking account on February 20, 1975, in Abilene, Texas. Mikelco checks totaling $33,562.12 were deposited in the account (Tr. 942-943). Other checks made payable to Abtex and totaling more than $23,000 were cashed at a bank in Abilene. Cash received from checks drawn on the Abtex account was used by petitioner personally (Tr. 547-563, 651, 943).

Petitioner testified in his own behalf and denied that he knew the claims submitted to the Air Force by his employees at Mikelco were false (Tr. 875-880).

ARGUMENT

1. Petitioner contends (Pet. 6-10) that the district court erred in its instruction concerning the way in

which the government could establish that petitioner knew of the falsity of the Mikelco claims submitted to the Air Force. The court stated (Tr. 1155-1156; emphasis added):

> You are instructed that you cannot find a defendant guilty with respect to any count in the indictment merely from the fact, if you find that it was a fact, that he was the president of this Mikelco of Bandera, Inc. It is necessary that you find beyond a reasonable doubt that any act you may have found beyond a reasonable doubt to have been committed by the defendant was done or committed knowingly. *In this connection, however, you are instructed that a person who makes a claim or causes it to be made with reckless disregard for the truthfulness of the claim and with the conscious purpose to avoid learning the truthfulness of the claim is deemed to have knowledge of the claim and its truthfulness or lack thereof.*

Petitioner argues that the charge was inadequate because it permitted the jury to employ an objective rather than a subjective standard of guilt. In petitioner's view, the district court's instruction would have been proper only if it had been accompanied by a further instruction like that endorsed in the American Law Institute's Model Penal Code (1962). Section 2.02(7) of the Code states:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

The district court told the jury that it could find that petitioner knew the Mikelco claims were false if it determined beyond a reasonable doubt that he acted

with reckless disregard for the truthfulness of the claims and with a conscious purpose to remain ignorant on the subject. The reference to petitioner's "conscious purpose" demonstrates that the court employed a subjective standard of culpability, not an objective standard as petitioner asserts. The district court's charge was entirely appropriate in this case, where petitioner contended that he was not sufficiently involved in the daily operations of Mikelco to know that the claims were false. The evidence showed that petitioner supplied the blank Abtex invoices, that he owned Abtex, that Abtex was a fictitious company, and that petitioner made personal use of money paid by Mikelco to Abtex for supplies that were never shipped and never received. Although petitioner may not have known the details of each claim, he profited from the fraud and knew that Abtex could not possibly have provided Mikelco with parts. He could not have maintained an "actual belief" that the Mikelco claims were truthful, and, accordingly, the district court's failure to refer explicitly to his "actual beliefs" was not unfairly prejudicial.

An instruction like that given here was sustained in *United States* v. *Evans*, 559 F. 2d 244 (5th Cir. 1977), cert. denied, 434 U.S. 1015 (1978). See also *United States* v. *Restrepo-Granda*, 575 F. 2d 524, 528-529 (5th Cir.), cert. denied, No. 78-5448 (Oct. 30, 1978); *United States* v. *Lange*, 528 F. 2d 1280, 1288 (5th Cir. 1976). Other circuits have also approved instructions permitting a finding of knowledge based on a defendant's conscious purpose to avoid learning the truth. See *United States* v. *Thomas*, 484 F. 2d 909, 912-913 (6th Cir. 1973); *United States* v. *Grizaffi*, 471 F. 2d 69, 75 (7th Cir. 1972); *Griego* v. *United States*, 298 F. 2d 845, 849 (10th Cir. 1962). Petitioner argues, however, that the present case conflicts with decisions by the

Second Circuit in *United States* v. *Bright*, 517 F. 2d 584, 586-588 (1975), and the Ninth Circuit in *United States* v. *Esquer-Gamez*, 550 F. 2d 1231, 1234-1236 (1977), in both of which convictions were reversed because of improper instructions by the district court.

Bright is readily distinguishable from the present case on several grounds. First, the district court charged in the disjunctive that the jury could find the defendant had the requisite knowledge if it found that she acted with reckless disregard for the truth *or* with a conscious effort to avoid learning the truth.[1] Here, the district court's instruction required both reckless disregard and a conscious purpose to remain ignorant. The charge thus ensured that the jury would not convict unless it found that petitioner deliberately tried to avoid learning whether the Mikelco claims were false. Second, the jury in *Bright*, after it began its deliberations, specifically inquired about the meaning of "reckless disregard" as that phrase pertained to the defendant's knowledge that the checks she possessed were stolen. The district court simply repeated its previous instruction and offered no balancing language designed to preclude a conviction based on mere recklessness or negligence. Here, by contrast, there was no inquiry from the jury, and the district court charged (Tr. 1155) that petitioner could be convicted only if the jury found beyond a reasonable doubt that he had "knowingly and willfully" presented false claims. The court stated (*ibid.*):

[1]The Second Circuit had previously held that the disjunctive charge alone was not sufficient to require the reversal of a conviction for making knowingly false statements to a government agency, in violation of 18 U.S.C. 1001. See *United States* v. *Sarantos*, 455 F. 2d 877, 880-882 (2d Cir. 1972). See also *United States* v. *Egenberg*, 441 F. 2d 441, 444 (2d Cir.), cert. denied, 404 U.S. 994 (1971); *United States* v. *Abrams*, 427 F. 2d 86, 91 (2d Cir.), cert. denied, 400 U.S. 832 (1970).

> An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.
>
> The word wilfully as used in this charge means that the act was committed by the defendant voluntarily and intentionally and with knowledge that it was prohibited by law and with the purpose to disobey or to disregard the law and not by mistake, accident or in good faith.

Finally, in *Bright*, defense counsel pressed vigorously for an instruction specifically stating that the government could not prove guilty knowledge merely by showing foolishness or negligence. Here, defense counsel objected (Tr. 1160) to the district court's charge on the ground that the court failed to give petitioner's requested instruction Number 20, dealing with "the good faith mistake of fact" as a defense. Although the district court did not follow the exact wording of the requested instruction and, in particular, did not mention explicitly the significance of petitioner's "actual beliefs," the court did prohibit the jury from convicting petitioner on the basis of acts done by "mistake, accident or in good faith." This language, taken together with the rest of the court's instructions, was sufficient to describe the requisite degree of culpability.

In comparison with *Bright*, *United States* v. *Esquer-Gamez*, *supra*, is closer to the present case, but the Ninth Circuit's opinion does not suggest that the district court there told the jury that it could not convict the defendant on the basis of acts done "by mistake, accident or in good faith." The court of appeals stated (550 F. 2d at 1236):

> While the circumstances surrounding the transfer of the packages make the defendants' explanations highly suspect, the jury might have believed them

> and concluded that each of them honestly believed that the package that he handled did not contain drugs. Yet the jury was not given a direct instruction to acquit if that were what it found.

Here, the jury was told that it could return a guilty verdict only if it found that petitioner knowingly and willfully submitted false claims. The jury was further instructed that a finding of knowledge and willfullness could not rest on acts done by mistake or accident or in good faith. Although petitioner's current objection to the charge would have been forestalled if the district court had added a reference to the importance of his actual beliefs, in accordance with Model Penal Code §2.02(7), the failure to include the precise statement requested by petitioner did not mislead the jury or allow it to return a conviction not supported by an adequate finding of culpability.

Because the relevant instructions here and in *Esquer-Gamez* were not identical, and because each jury charge must be evaluated as a whole in a particular factual context, it is by no means clear that any actual conflict exists between the Fifth and Ninth Circuits. However that may be, this is not a suitable occasion for this Court to undertake to resolve any possible inconsistency, because the evidence against petitioner was strong and the district court's instructions to the jury sufficiently described the culpability element of the false claim offense.

2. Petitioner challenges the sufficiency of the indictment on three grounds (Pet. 10-15). Each is without merit.

a. Petitioner first contends (Pet. 11-12) that "willfulness" is an "essential element" of an offense under 18 U.S.C. 287 and therefore should have been, but was not, alleged in the indictment. Section 287 provides:

> Whoever makes or presents * * * any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be [punished] * * *.

The statute does not mention "willfulness", and the term need not be included in an indictment charging a violation of Section 287.[2] Cf. *Pino* v. *United States*, 370 F. 2d 247, 248-249 n.1 (D.C. Cir. 1966), cert. denied, 387 U.S. 922 (1967).

Petitioner argues that because willfulness is an element of an offense under the Criminal Code's false statement provision, 18 U.S.C. 1001, and because Sections 287 and 1001 were once part of the same statute (see *United States* v. *Bramblett*, 348 U.S. 503 (1955)), a willfulness requirement should be read into Section 287. This contention ignores the most significant feature of the historical background of the two statutes. The willfulness requirement, included in Section 1001, was not inadvertently omitted from Section 287 when the false statement and false claim provisions were separated in 1948 (62 Stat. 698, 749). Rather, Congress required willfulness in connection with false statement violations as early as 1918, when both the false claim and false statement provisions still appeared together in Section 35 of the Criminal Code (see 40 Stat. 1015-1016), but no such culpability requirement was included in the false claim portion of Section 35. Thus, to the extent the historical development of the current provisions is at all revealing, it suggests that Congress deliberately chose to make criminal only those false statements that were

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[2]As the court of appeals correctly observed (Pet. App. A-3), "the congressionally approved Form 10 of the Federal Rules of Criminal Procedure designed for section 287 indictments omits willfulness as an element of the offense."

both knowingly and willfully made, whereas a simple knowledge requirement was thought sufficient in connection with false claims against the United States.

Johnson v. *United States*, 410 F. 2d 38, 47-48 (8th Cir.), cert. denied, 396 U.S. 822 (1969), on which petitioner relies, does not support his position. *Johnson* does not require that willfulness be alleged in an indictment under Section 287. Indeed, the court of appeals' opinion states that the defendant in that case "was charged with knowingly making a false claim to a government agency" (*id.* at 47; see also *id.* at 41). From all that appears, no allegation of willfulness was contained in the Section 287 count of the indictment sustained in *Johnson*, and the decision there in no way conflicts with the court of appeals' ruling in the present case.

Finally, as indicated above (see pages 6-7 *supra*), the district court in this case charged the jury that it could convict petitioner only if it found "that the act or acts of making or presenting any [false] claim [were] knowingly and wilfully done" (Tr. 1155). Because the district court required a finding of willfulness as a prerequisite to petitioner's conviction, petitioner was not prejudiced by the omission of the term from the indictment, even if willfulness is properly characterized as an element of an offense under Section 287. The indictment was plainly adequate to inform petitioner of the offense with which he was charged, to permit him to prepare his defense, and to protect him from double jeopardy. Nothing more is necessary. *Hamling* v. *United States*, 418 U.S. 87, 117 (1974).

b. Petitioner also asserts (Pet. 12-13) that the indictment should have alleged "willfulness" because 18 U.S.C. 2(b) provides that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense * * *, is punishable as a

principal." But petitioner was indicted directly under Section 287,[3] and there was no need to invoke Section 2(b) in order to charge him as a principal. See, *e.g.*, *United States* v. *Catena*, 500 F. 2d 1319, 1322-1323 (3d Cir.), cert. denied, 419 U.S. 1047 (1974), and cases there cited. See also *United States* v. *Salliey*, 360 F. 2d 699, 701 (4th Cir. 1966). (holding that, in any event, an express allegation of willfulness is not necessary in an indictment relying on 18 U.S.C. 2(b)).

United States v. *Beard*, 414 F. 2d 1014 (3d Cir. 1969), on which petitioner relies, is inapposite. Appellants there were indicted under a different statute (18 U.S.C. 2314) and the omission of an allegation of unlawful and fraudulent intent meant that they could have admitted everything charged in the indictment and still not have been guilty of a criminal offense. That was not so here.

c. Petitioner's final contention (Pet. 14-15) is that the indictment was fatally defective because it did not charge that the five false claims were presented "to" an officer, agency, or department of the United States. This argument is insubstantial. The indictment stated that petitioner presented false claims "against" the Air Force. Each count also specified the date and number of the claim and the item or items "billed to the Air Force" that petitioner allegedly knew had never been supplied. The indictment adequately charged that the false claims were presented to the Air Force, a department or agency of the United States. No element of the offense was lacking.

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[3]Each count of the indictment stated that petitioner "did make and present and cause to be made and presented a false and fictitious claim against the United States and a department and agency thereof, namely, the United States Air Force * * * in violation of Title 18, United States Code, Section 287" (Tr. 1151-1154).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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